**IN THE UNITED STATES BANKRUPTCY COURT**
**FOR THE WESTERN DISTRICT OF NORTH CAROLINA**
**Charlotte Division**

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| IN RE:<br><br>GARLOCK SEALING TECHNOLOGIES LLC, et al.,<br><br>Debtors.[1] | Case No. 10-BK-31607<br><br>Chapter 11<br><br>Jointly Administered |

**COLTEC INDUSTRIES INC.'S POST-TRIAL BRIEF**

[1]The debtors in these jointly administered cases are Garlock Sealing Technologies LLC; Garrison Litigation Management Group, Ltd.; and The Anchor Packing Company (hereinafter "Garlock" or "Debtors").

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## PRELIMINARY STATEMENT

As Coltec observed in its opening statement to the Court, we are before the Court for a reason. Companies and individuals file for bankruptcy protection for a variety of reasons, but each has an economic purpose in mind that it believes bankruptcy processes will properly help it achieve. Whether that goal is to extend the term of a matured loan on restructured terms to permit the debtor to manage its debt service within available revenues, or to discharge a crippling judgment in order to permit a fresh start, or to shed leases on underperforming retail locations and limit landlords' damage claims pursuant to Section 502(b)(6), all are legitimate and intended uses of the system of bankruptcy reorganization established by Congress in Title 11. In what was probably the most astonishing proclamation made in the course of the entire Estimation Trial (the "Trial"), counsel for the Asbestos Claimants Committee (the "ACC") in his opening statement posited that "…the bankruptcy court does not sit to rearrange the economic factors working on litigants outside of the bankruptcy court." (Tr. p. 144) With respect, that is precisely the purpose of the bankruptcy court, and this Court very well knows the truth of Judge Postner's rebuke to counsel's proposition. *See In re Muralo Co.,* 301 B.R. 690 (Bankr. D.N.J. 2003).

There is absolutely nothing exotic about these bankruptcy cases, other than the sheer volume of claims at issue. The Debtors in these cases entered the bankruptcy system because continuing to resolve those claims in the tort system was unsustainable. It was also not a promising course of action for those whose asbestos claims against the Debtors would not arise until years into the future, since it would have led to the exhaustion of the Debtors' available assets long before those future claims would arise and be asserted.[2] Throughout these

[2] The position of the FCR has often been difficult for Coltec to understand, in particular why the representative of future claimants would endorse estimation methodologies that have the effect of inflating the value of presently *(continued on next page)*

proceedings, the ACC and the Future Claimants Representative (the "FCR") (collectively with the ACC, the "Claimants' Representatives") have consistently relied upon the premise that these bankruptcy cases are irrelevant to the resolution of the Debtors' liabilities to present and future claimants, and the estimation methodologies and results they offered at the Trial are the logical extensions of that flawed premise.

Coltec relies upon and fully endorses the Debtors' Post-Trial Brief and Summary of Evidence Presented at Trial. Their meticulous navigation through the evidence proves a compelling case in support of the estimation methodology and results offered by the Debtors' experts. Instead of echoing the Debtors' work, in this Brief Coltec will focus its attention on several general themes that can and, Coltec believes, should guide the Court on the path forward.

We begin with a discussion about the purposes and uses to which the results of the Trial will be put in these cases and with the proposition that these purposes and uses must necessarily influence the value and weight to be assigned to the various estimations offered at the Trial.

Next, we discuss the fallacy of the Claimants' experts' self-proclaimed "standard" methodology, both in concept and utility. (Collectively, Dr. Peterson and Dr. Rabinovitz are referred to as the "Claimants' experts".) Conceptually, their methodology is laid bare when one takes a close look at how its tenets create a snowball effect in the system where the last debtor to file for bankruptcy – often the companies like Garlock whose asbestos-related liabilities are minor in a rational system – is allocated a disproportionately large liability share. Further, the utility of the Claimants' experts' methodology is crippled by uncertainty and lack of scientific rigor. Claimants' experts' complete failure to test their work or ask the very basic questions

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existing claims and, thereby, distorting the relative share of the Debtors assets that will be required to satisfy those claims vis-à-vis the claims of future claimants.

regarding changing behaviors caused Dr. Heckman to reject them as failing the most rudimentary tests for scientific validity.

Coltec further questions the credibility of the Claimants' experts' methodology through their failure to consider and rely upon fresh information contained in current claimants' questionnaires and responses. While any legitimate scientist would scoff at the suggestion that one should turn a blind eye to current data, the Claimants' experts' refusal to incorporate the current data revealed the fact that they could not use real data and remain true to their "standard" methodology. The incongruence of their method with known facts about current claimants further proved their methods unsound.

Finally, Coltec returns to the "purposes and uses" of an aggregate estimation and discusses how the estimations offered by the Claimants' experts have absolutely nothing useful to say about the tasks now confronting the parties in these Chapter 11 cases. Once the debris of their work is cleared, it is apparent that only the Debtors' experts provided the Court and the parties with the tools they require to construct a plan or plans of reorganization, negotiate to find points of agreement and identify points of disagreement, and assess the crucial question of the feasibility of any proposed plan of reorganization.

## ARGUMENT

This Court has recognized that there are multiple purposes for which an aggregate estimation of contingent and unliquidated claims may be needed in a case. (*See* April 13, 2012, Order for Estimation of Mesothelioma Claims (D.E. 2102) (the "Estimation Order") ¶¶ 4-6.) The particular purpose or purposes for which an aggregate estimation are to be used should guide and shape the methodology that is used for that estimation, and no single estimation method or conclusion may be appropriate for all the purposes for which an estimation may be needed in the

course of a Chapter 11 case. *E.g., In re Federal-Mogul Global Inc.,* 330 B.R. 133, 155 (D. Del. 2005) (the preferred methodology for an estimation is "whatever method is best suited to the particular contingencies at issue"). (*See also Bittner v. Borne Chemical Co.,* 691 F.2d 134, 135 (3d Cir. 1982); *In re Armstrong World Indus*., 348 B.R. 111, 124 (D. Del. 2006); *In re Texans CUSO Ins. Group, LLC,* 426 B.R. 194, 204 (Bankr. N.D. Tex. 2010)). In addition, the form in which the results of an estimation may take and the degree of precision the estimation may have likewise may depend on the purpose or purposes for which such results are to be used in the case.

This point is well-illustrated by one of the opinions most often cited by the Claimants' Representatives. Judge Robreno's opinion in *In re Armstrong World Industries, Inc.* is replete with cautions about imposing more certainty on an estimation of future contingent and unliquidated demands than is warranted by the evidence or can be supported by the estimation methodology. As Judge Robreno discussed,

> [t]he Court recognizes that we are dealing with uncertainties, and are attempting to make predictions which are themselves based upon predictions and assumptions. Therefore, the Court will not seek to analyze the estimations before it for mathematical precision, nor will it attempt to reach its own exact number. Rather, the Court's task will be to assess the parties' experts' estimations of the pending and future asbestos personal injury liability, and determine how well these estimations incorporate historical factors and account for changed circumstances in the asbestos litigation environment.

*In re Armstrong World Indus., Inc.*, 348 B.R. at 124 (internal citations omitted). Fortunately for Judge Robreno, the estimation task before him required no great degree of accuracy or certainty; all that was required to answer the "unfair discrimination" question presented to him was to decide whether the reasonably likely future claims against the debtor would exceed some threshold value. He was not required to decide, and took pains to avoid deciding, exactly what the actual value of those claims would be.

We start with this reminder – that aggregate estimation of claims is a plural and flexible concept, not a singular and rigid one – because it was often possible to interpret the positions of the parties to these proceedings as being that the product of the Trial would be one artificially precise number representing Garlock's liabilities to mesothelioma claimants that could answer all questions and serve for all purposes and uses in these Chapter 11 cases.[3] As will be more fully argued later in this Brief, only Dr. Bates provided the Court with a ***set*** of estimation results sufficiently flexible and nuanced to be adaptable to the multiple questions and tasks ahead in these cases. Only Dr. Bates' models permit the parties and the Court to examine and consider the various constitutive pieces that combine to make an aggregate examination and then to reliably consider and test how any particular aggregate estimation would adjust based on changes in the underlying data or changes in the initial assumptions. Only his models are conceptually rich enough to support answers to both of the two fundamental questions posed in the Estimation Order: (a) what is the amount of the Debtors' actual liabilities determined under Section 502(c); and (b) what funding will likely be required to resolve those liabilities under a feasible plan of reorganization.

## I. THE CLAIMANTS' REPRESENTATIVES' ESTIMATIONS PROMOTE AN INHERENTLY FLAWED AND DISPROPORTIONATE SYSTEM WITH LITTLE UTILITY TO THE COURT IN THESE PROCEEDINGS.

The estimation methodology presented by the Claimants' Representatives is tactical alchemy, plain and simple. The Debtors presented ample and compelling evidence at recent hearings and the Trial about the ways in which some asbestos plaintiffs' counsel used

[3] More precisely and accurately, the premise is that there would be two numbers, one representing the aggregate liability to "present" claimants and a second representing the aggregate liability to "future" claimants. However, for simplicity and to underscore the point being made here, we refer to a single aggregate number, though the second is not simply an extension of the first into some future period, as the Claimants' Representatives would have the Court believe.

misalignments between tort system processes and bankruptcy processes to manipulate tort system settlements and verdicts, but Coltec's point here is a different one. It is this: the nature of the estimation methodology employed by the Claimants' experts, when applied repeatedly over time in sequential bankruptcy cases, yields an aggregate result that is systematically distorted. That this is so can be understood when the operative elements of what Dr. Peterson referred to as the asbestos "system"[4] are distilled from the flow of the testimony and their logic can then be examined and debunked.

With disarming candor, Dr. Peterson laid bare for the Court the development of those processes by which, over the past thirty years, tort system straw has been spun into bankruptcy gold. The story he told was conveyed in a measured and authoritative manner, giving it a patina of plausibility and reasonability that masks what is, in fact, a remarkably illogical evolutionary history. The story is one of how interactions between the tort system and the bankruptcy system have worked, over a period of over two decades, to virtually invert the order of relative responsibility to tort claimants the various asbestos defendants were carrying in the tort system and, in addition, to increase the total pool of compensation available to asbestos claimants over what would likely have been available to them had all defendants remained in the tort system. It is a story of how the habitual use of the so-called "standard" methodology for estimating claims in the bankruptcies of asbestos defendants has produced an aggregate outcome for asbestos defendants and asbestos claimants that would never have occurred in the tort system itself.

**A. Most Culpable = First to File; Least Culpable = Last to File.**

First, to escape crushing liabilities in the tort system, the most culpable defendants were the earliest to file for bankruptcy protection, with successive waves of bankruptcy filings

[4] Dr. Peterson's history of the asbestos litigation "system," his word for it (Tr. pp. 3852, 3853, 3854), can be read in full at Tr. pp. 3851-3881 and is illustrated in ACC Demonstrative Exhibit 824, Slides 1-17.

thereafter by progressively less and less culpable defendants. In the sense used here, "more culpable" and "less culpable" are shorthand phrases to refer to the relative strength of the tort system defenses defendants possessed, or, put differently but equivalently, the relative assignment of liability shares by juries when all defendants were still defending in the tort system.[5] A corollary of this proposition is that the least culpable defendants are likely able to shepherd any available insurance coverage for a longer time, delay the escalation of their defense costs longer, and manage their uninsured indemnity payments longer than the more culpable defendants. They will be, in other words, very likely be the last in line to seek bankruptcy protection.

These Debtors are instances of that proposition, having defended in the tort system with reasonable success for twenty-eight years after the first bankruptcy filing by Johns Manville. The science-supported defense that the Debtors' gaskets made no one sick in conjunction with evidence against the manufacturers of truly dangerous asbestos products was highly successful, as it should have been in an open system in search for the truth.

**B. After Bankruptcy Filing, a Former Tort System Defendant's Liability is Redistributed to Those Defendants Remaining in the Tort System.**

Second, the Claimants' experts' method assumes defendants who exit the tort system for bankruptcy never return to the tort system. (Tr. p. 3861.) Instead, the liability shares they formerly carried in the tort system are redistributed among those defendants remaining in the tort system. This redistribution of the liability of an exiting defendant is a function of several

[5] Dr. Peterson himself used a variant formulation of the concept, sometimes speaking of "major defendants" and "peripheral defendants," and sometimes speaking in terms of the amount of money each defendant contributed to the "system" and the consequences of the withdrawal of that money from the "system." (E.g., Tr. p. 3857.) The expression chosen here – "culpability" – is intended to be more precise and to more clearly reflect the fact that the task before the parties and the Court is not to re-create some extra-bankruptcy "system" but instead to estimate Garlock's liabilities to claimants. It is also meant to reflect the fact that – as all the contending parties agree – tort system outcomes, especially those resulting from jury verdicts, reflect the relative liability shares of the defending parties, i.e., their relative culpability for a plaintiff's injury.

features of the tort system. Those include, among others, systems of joint or joint and several liability; statutory or court rules limiting or restricting the ability of juries to assign liability shares to absent defendants or to bankrupt defendants; and the practical difficulties of conducting discovery and obtaining information concerning non-party defendants, especially non-party bankrupt defendants.[6] They are also attributable in part to changes in the behavior of participants remaining in the tort system, as plaintiff law firms turn their energy to the development of cases against formerly "peripheral" defendants, and those formerly "peripheral" defendants evolve new settlement strategies to cope with the new attention they are receiving. (E.g., Tr. pp. 3869 – 3873; ACC Ex. 824, Slides 8-10.)

Third, the transfer of liability described in the preceding point compounds as successive bankruptcy filings occur, with the result being that the last defendant to file experiences the greatest transfer of liability. Since the last defendant to file will be the least culpable defendant, the least culpable defendant will therefore experience the greatest transfer of liability, and that transfer will be the liability shares otherwise assignable in the tort system to more culpable defendants.

An example illustrates the operation of these first three points concerning the "system" described by Dr. Peterson. Assume there are four parties defending and paying claims in the tort

[6] To illustrate this confounding system, Dr. Peterson believes that the share responsibility of Garlock in all the asbestos cases is 50 percent and there are always only 2 defendants when he reviewed the five years prior to the bankruptcy. (*See* Tr. pp. 3975.) "[Question] So you're saying in the average Garlock case there are only two parties responsible? [Answer] That's its history. Yes, absolutely. We've compared for the cases for which we have data on both the verdict against any -- total verdict in the case and the amount eventually paid by Garlock. We've compared those two. And generally, Garlock pays half of the verdict which implies a two-defendant share." Conversely, Dr. Bates in review of the true history of the Garlock claims, determines that historically there was an average of 36-defendant share. "Since that threshold is 50 percent, and our analysis shows that the number of potential liable parties is somewhere in the neighborhood as I will explain of about 36, and given that Garlock is a low-dose defendant, it's virtually impossible to imagine a situation where in any kind of a fair proceeding, Garlock would find up with a 50 percent liability determination that would put those states in joint and several." (Tr. p. 2790.) It is preposterous to believe that Garlock will owe 50 percent of the share of claims of all mesothelioma cases in the future as espoused by Dr. Peterson.

system and that their shares of liability for each dollar of indemnity payment awarded in the tort system are allocated as follows: Defendant A: -- 40%; Defendant B – 30%; Defendant C – 20%, and Defendant D – 10%. When A seeks bankruptcy and exits the tort system, thereafter each dollar of indemnity payment awarded in the tort system will be re-allocated among the remaining defendants as follows: Defendant B – 50%; Defendant C – 36%, and Defendant D – 14%.[7] This process continues until Defendant D is the only remaining tort system defendant and bears 100% of each dollar of indemnity payment awarded to claimants in that system.[8]

One could argue that the foregoing example must be incomplete and distorted, since Defendant A is not absolved from responsibility to pay its liability share to asbestos claimants because of its bankruptcy filing. After all, the automatic stay does nothing to affect a debtor's liability for any claim, it only acts to create a pause in litigation and collection efforts against a debtor. Defendant A should, in time, confirm a plan of reorganization, establish a Section 524(g) trust, and resume paying claims. Those trust payments would logically be considered substitutes for the indemnity payments Defendant A was paying while still in the tort system, and they would logically be credited to the shares of the defendants remaining in the tort system, thereby restoring the original proportionality of liability shares among the group of defendants.

Certainly, in the abstract and in a perfectly efficient system, this argument would be well-founded, and the liability shift illustrated by the example would not occur. But, as will be developed in the next paragraphs, the interaction between the tort system and the bankruptcy system is not such an efficient system, and advantage is taken through the perpetuation of those

[7] The formula is straightforward: B2 = B1 + ((B1/(B1+C1+D1)) * A1), and so on.

[8] Indeed, Dr. Peterson testified at Trial that while Garlock began as a peripheral defendant, after the bankruptcy wave, Garlock ended its tort experience, according to Dr. Peterson, with a fifty percent liability share. (Tr. p. 3922, stating that "the average shares in 2000s was two"; Tr. p. 3975, "[a]nd generally, Garlock pays half of the verdict which implies a two-defendant share.")

inefficiencies. Because of those inefficiencies, systematic distortions do occur, with the result that the liability transfer example among Defendants A, B, C, and D is wrong only in degree, but it is not wrong in concept. Much of the evidence at the Trial centered on the parties' positions concerning the nature, extent, and causes of such inefficiencies.

**C. Even After Section 524(g) Bankruptcy Trusts are Established for the Former Tort System Defendants, Those Defendants Remaining in the Tort System Continue to Pay a Substantial Portion of the Former Defendants' Liability Shares.**

Fourth, continuing with the story, several structural features of the bankruptcy process have meant that tort system defendants have not received dollar-for-dollar credit against their liabilities for payments made by bankruptcy trusts to claimants. The principal features include:

(a) the lengthy time required to confirm a plan of reorganization, establish and fund a Section 524(g) trust, and then clear and pay the backlog of claims accumulated during the period of bankruptcy administration. During that time the remaining tort system defendants continue to defend and resolve claims without benefit of any credit for the liability shares previously paid by the bankrupt defendant; and

(b) the design of Section 524(g) trusts and provisions embedded in trust documents and trust procedures that restrict disclosure of and access to information about the identities of trust claimants and the amounts paid to trust claimants. This point is independent of, and is in addition to, the ample persuasive evidence offered by Debtors concerning manipulation of information that occurred in the tort system due to asymmetrical access to information about trust claims and trust payments, such manipulation resulting in depriving Debtors of credits or of defenses from which they would otherwise have benefitted.[9] "Bad acts" by "bad actors" taking

[9] Dr. Brickman noted: "There is the confidentiality, there's the sole benefit, and there is the withdrawal deferral….. These are three trust provisions that I refer to in some -- extensively in my report as being part of the strategy of the *(continued on next page)*

advantage of asymmetries in the interplay between the tort system and the bankruptcy trust system magnify the distortions caused by the structural features of the bankruptcy trusts and are, in turn, facilitated and made possible by those structures. Dr. Peterson does not himself analyze the causes for any of this, but he confirms its truth in his testimony. (E.g., Tr. pp. 3861, 3867, 3986-3988.)

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plaintiff's bar of suppressing access to trust claims enabling plaintiffs to misstate in the tort case, their exposures, to deny that they filed trust claims when in fact they did, or when in fact their lawyers filed 524(g) ballots, or when their lawyers filed 2019 statements. (Tr. p. 1170.) … But in practice, here's how it works. The claimant files 13, 14, 15 trust claims, even before filing the tort claim. Then he defers them or withdraws them. So now he's tolled the statute of limitations. He preserves his place in line in terms of when he gets paid, the FIFO line. But when he testifies, when he is asked in interrogatories and in depositions, did you file any trust claims, he says, 'no'. And plaintiff's counsels argue, hey, we didn't file any trust claims. If it turns out in the relatively rare circumstances that the defendant is able to find out about this, the plaintiff counsel's argument is, we didn't file a trust claim. We withdrew it. We deferred it. So now you see it, now you don't. It's a trust claim and then it instantly disappears off the record. I think that speaks for itself. (Tr. p. 1175.)

Mr. Magee elaborated: "Well, the trust had provisions -- these trust distribution provisions that made the information that we thought was going to be coming back into the system confidential. There was confidentiality provisions. There was what we'll talk about the sole benefit provision. And then there was these deferral withdrawal provisions that would allow the plaintiff to make a claim, withdraw the claim, and keep their place in line. So as we found out, when we finally got discovery, here it became a practice to file claims, withdraw them to defer them to keep their place in line. Wait until the tort claim was over, and then go refile those claims. That became a practice so that we didn't have that information in the tort system. But the one that really galled me the most was the sole benefit provision, and that's up here. It first began appearing in these trusts in 2007, I believe, right after Garlock got involved in the Pittsburgh corning and W.R. Grace cases to try to figure out what was going on to see if we could change things about that same time. And this provision was particularly galling. You look at the highlighted part it says, similarly, failure to identify this particular debtor's products and operations in the claimant's underlying tort action, or to other bankruptcy trusts, does not preclude the claimant from recovering from the trust. In other words, the claimant now not only -- not only was that practice happening now, it was invited to happen. You don't have to identify the products of the trust in your underlying tort litigation and you can still come in here to our trust and recover, notwithstanding the fact that you haven't identified the product or that you even denied exposure of the product, you know, in the tort litigation. (Tr. pp. 2582-2583.)

Mr. Patton for the Claimants' Representatives concurred: "We draft the trust agreements with these confidentiality provisions for several reasons. One is to make sure that when a trust is negotiating with plaintiff law firm A, the trust doesn't have to reveal to plaintiff law firm B, information about the negotiations with A. We also want to make sure from the point of view of the trust, that we don't have to have the trust involved in unnecessary production information and otherwise dragged back into the tort system that we just took the defendant out of. We also are trying to mirror the system that existed prebankruptcy. Garlock doesn't reveal its settlement history unless it's required to in the context of a verdict. Now, from the point of view of plaintiffs, the reasons why they want these provisions are peculiar to their point. I'm sure, from their point of view, it is useful to not reveal their settlements with a defendant or with a trust in the context of the tort system, because it helps them with their negotiations with other defendants." (Tr. pp. 3754-3755.)

The fact that defendants remaining in the tort system do not and have not received a dollar-for-dollar credit for amounts funded into a Section 524(g) trust by a bankrupt former tort system defendant creates a distortion for the remaining tort system defendants *even if the funds deposited into a Section 524(g) trust by the bankrupt defendant exactly equal that defendant's proportionate share of liability when all defendants were still defending in the tort system.* We might call this shortfall the "bankrupt share deficit." The result of all this is that while the defendants remaining in the tort system should receive some credit for distributions from the Section 524(g) trusts of bankrupt former defendants, they still must themselves absorb the cumulative "bankrupt share deficit" of all other defendants who have previously exited the system and sought bankruptcy protection.

**D. The "Standard" Methodology Forces Later Bankruptcy Filers to Overfund Trusts Based on 100% of the Tort System Liability PLUS the "Bankrupt Share Deficit" Transferred From the Earlier Filers.**

Now, at last, we come to the part where tort system "straw" is spun into bankruptcy "gold." According to Dr. Peterson's thesis and the Claimants' experts' "standard" method of estimation, the amount required for a bankrupt defendant to resolve its liability in a Chapter 11 plan and fund a Section 524(g) trust is derived from that defendant's settlement payments in some selected period of time next preceding the defendant's bankruptcy filing (the "calibration period"), because those settlements best reflect the amount the defendant would have had to pay to resolve the claims against it had it remained in the tort system and not filed for bankruptcy. (Tr. pp. 3979-3980, 4049.)[10] The difficulty with this simplistic thesis is that, except for the

[10] As Dr. Heckman admitted, it did not require him to point out the flaws in Dr. Peterson's and Dr. Rabinovitz' simple extrapolation methodology because they were so elementary. (Tr. pp. 4254-55.) However, Coltec retained Dr. Heckman to assist the Court by bringing to bear his enormous expertise—which is recognized and is in high demand across the world—on the question of whether the Court can trust the opinions of the Claimants' experts. Dr. Heckman answered: "I do not believe either Dr. Peterson or Dr. Rabinovitz used what I would consider reliable and established methodologies that are useful across these different areas of knowledge. . . . They also do not employ *(continued on next page)*

hypothetical first defendant to file for bankruptcy protection (i.e., the most culpable defendant), the pre-bankruptcy settlements of every defendant filing for bankruptcy protection reflect and include the "bankrupt share deficit" already absorbed by that defendant as a result of the liability transfer described in the foregoing paragraphs.

If Peterson's estimations are used, these later bankrupts are forced to pay into the bankruptcy system 100% of their proportional tort liability ***plus*** the full amount of the bankruptcy share deficit accrued pre-filing, thereby causing a double pay of the deficit amount into the trust system. With every successive bankruptcy filing by an asbestos tort defendants, the double pay becomes triple, quadruple, and so forth, since the bankrupt share deficit continues to be paid into the bankruptcy pool (via the "standard" method of estimation) while also staying behind in the tort system, accruing and multiplying with the additional deficit attributable to the recent filer. As more and more asbestos defendants matriculate through the "system," the bankruptcy "pie" gets bigger while the tort "pie" stays constant, albeit with a heavier load to pay for those companies remaining behind.

Ultimately, because each bankrupt defendant's estimated liabilities are, for purposes of its Chapter 11 plan and Section 524(g) trust, derived from its pre-bankruptcy settlements (according to Claimants' experts), and because those pre-bankruptcy settlements are inflated by the effect of the bankrupt share deficit, there is a compounding effect that occurs as successive bankruptcy filings take place. And this effect leads to two final propositions for the "system" that must flow from the perpetuation of the "standard" methodology in estimations:

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what I would consider the scientific method, this rigorous method that's developed across a number [of fields] and report and . . . subject their analyses to the kind of scrutiny that is standard." (Tr. p. 4334.) Coltec respectfully submits that Dr. Heckman's rejection of Dr. Peterson's and Dr. Rabinovitz' forecasting methodology is conclusive, and the Court should find that Dr. Peterson's and Dr. Rabinovitz' opinions have no credibility and should be assigned scant weight.

(a) For the least culpable defendant who will be one of the last to file for bankruptcy protection, the estimated amount required to confirm a Chapter 11 plan and establish a Section 524(g) trust will include the greatest distortion and be least reflective of that defendant's actual proportionate share of liability when all defendants were still in the tort system;[11] and

(b) Once the vast majority of defendants have filed for bankruptcy, confirmed plans, and established Section 524(g) trusts, the aggregate total amount of funds in those trusts available to pay asbestos claimants will exceed the aggregate total compensation that would have been paid to those claimants had all defendants remained in the tort system.

The first proposition is economically devastating and patently inequitable for the last-in defendant, while the second results in a windfall for claimants and their attorneys. And so, in the end we have, indeed, "straw into gold."

**E. The Claimants' Experts' Estimation Conclusions for Debtors' Trust Funding are Completely Disproportionate to Debtors' Actual Liabilities in the Tort System.**

These final propositions may seem strange, but they are a direct function of the logic of the "system" described by Dr. Peterson and the estimation methodology employed by Claimants' experts in this case and in prior cases in which they have provided claims estimations.[12] That

[11] The temporal relationship described here is not a strictly linear one, since the bankruptcy filings of tort system defendants have occurred in groups or clumps – one clump in the early 1990's, a second and much larger clump in the period 2000-2002, and then the third clump after 2008, in which last grouping fall these Debtors. It is descriptive, however, of the sequencing of these groups or clumps.

[12] We have used Dr. Peterson here because his testimony most clearly sets out the logical sequence, but the very same holds true of the identical methodology employed by Dr. Rabinovitz. Instead of Dr. Peterson's term "system," though, she characterizes this process as an "industry." (Tr. pp. 4151, 4367.) Employing her concept of an "industry," we can call what has been tagged here the "bankrupt share deficit" as an "externality," that being the process by which bankrupt defendants externalize, or shift, a part of their tort system liability onto remaining tort system defendants. The "externalized" liability then becomes baked into the settlements of those tort system *(continued on next page)*

these conclusions are correct is confirmed by the actual history of funding of the Section 524(g) trusts in cases prior to these cases, which shows a definite pattern consistent with the propositions stated above. The chart attached as **Exhibit A** bears close study;[13] it compares the amount of funding contributed to each known Section 524(g) trust and attributable to mesothelioma claims[14] with the sum of two items related to these Debtors: (1) the indemnity amounts paid to mesothelioma claimants by Garlock since the date of the bankruptcy filing of each other debtor who has established a known Section 524(g) trust;[15] plus (2) the amounts

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defendants and then later becomes part of their estimated liabilities when they, in turn, finally file for bankruptcy protection.

[13] The data sources for this chart are – (a) Debtors included the following in their proposed exhibit list: GST-0138 - RAND Institute for Civil Justice, Asbestos Bankruptcy Trusts: An Overview of Trust Structure and Activity with Detailed Reports on the Largest Trusts ("RAND Report"), (b) Summary of settlement data from Garrison database between 1984 and 2010; See Bates Report, Exhibit 8, Page 34 and GST 1165, (c) Dr. Peterson's estimate of present and future claims is $1,265,000,000 (Tr. p. 3903), and (d) Dr. Rabinovitz' estimate of present and future claims is $1,292,000,000 (Tr. p 4222). To the extent the Claimants' Representatives object to the Court's consideration of the data presented in the RAND Report, such objection must be overruled as the data in the RAND Report is admissible pursuant to F.R.E. 803(18) & 1006. The data in the RAND Report propounded by Coltec is a record that compiles the holdings and judgments of various asbestos bankruptcies like the instant matter for the purpose of reporting those holdings and judgments to the general public. The data in the RAND Report is admissible pursuant to Rule 803(18) in that the data was reported in a periodical published by the division of the RAND Corporation that Dr. Peterson claims he founded and from which Dr. Peterson claims he gained his purported expertise in asbestos matters (Tr. pp. 3848, 4009.) In addition, Dr. Heckman relied upon the RAND Report in his direct and cross examination without objection from the Claimants' Representatives (Tr. pp. 4242, 4239.) Certainly, the RAND Corporation is not questioned by the Claimants' Representatives as a reliable authority. Therefore, the RAND Report is not hearsay pursuant to Rule 803(18). Finally, the data in the RAND Report propounded by Coltec is admissible pursuant to F.R.E. 1006 because it is a "summary, chart, or calculation to prove the content of voluminous writings, recordings, or photographs that cannot be conveniently examined in court."

[14] The established trusts were funded to pay non-malignant claims and non-mesothelioma malignancy claims as well as mesothelioma claims. For Garlock, the estimates produced for the recently concluded hearings are only for mesothelioma claims. In order to make a true comparison, the percentage of each trust's expected claims that are or are anticipated to be mesothelioma claims is multiplied by the total funding contributed to the trust, yielding an estimate of the portion of the trust funding that is attributable to mesothelioma claims. Where information is not available as to the breakdown of funding attributable to mesothelioma and non-mesothelioma claims, it is assumed that 100% of trust funding is attributable to mesothelioma claims.

[15] This element is included, again, for purposes of establishing a true comparison. Amounts funded into the known Section 524(g) trusts were meant to compensate claimants as of the date of the bankruptcy filing of each debtor together with claims arising after the date of the bankruptcy petition. In order to yield an accurate comparison, we use not only the expert witnesses' estimates of the amounts Garlock will need to fund for claims existing on June 5, 2010, and arising thereafter, but also the amounts actually paid on account of mesothelioma claims by Garlock during the period prior to June 5, 2010, and dating back to the date of the bankruptcy filings of each other debtor who has a known Section 524(g) trust.

Claimants' experts estimate must be funded by the Debtors to resolve present and future mesothelioma claims (hereafter, the sum of these two amounts will be referred to as the "Debtors' comparable total funding commitment").

The last column on the right of the chart sets out the amount by which Garlock's comparable total funding commitment would exceed or fall short of the funding contributed to each of the referenced Section 524(g) trusts and attributable to mesothelioma claims. Remarkably, the estimates offered the Claimants' Representatives, when combined with payments already made by Garlock, would result in these Debtors making a larger total funding commitment for mesothelioma claims than all but six of the Section 524(g) trusts established to date. The proposed funding commitment by Garlock would exceed the amounts actually funded by such primary, highly friable asbestos defendants as Federal Mogul (Turner & Newall)[16], National Gypsum, G-I Holdings, Eagle-Picher, Owens Corning-Fibreboard, Babcock & Wilcox, Combustion Engineering, Celotex, Armstrong World Industries, and DII (Halliburton). That Debtors are being called to pay substantially more into the system than these frontline, major asbestos defendants is the epitome of disproportionality.

With only a few exceptions, the "system" described and endorsed by Dr. Peterson means that Debtors' estimated total funding commitment will exceed all but a small handful of the "major" defendants' trust funding. The distortion is an artifact of the delay in Debtors' Chapter 11 filing relative to the filings by other defendants and the cumulative effect of the successive absorption by Debtors of "bankrupt share deficits." The delay in filing is a direct function of the fact that Garlock was a relatively less culpable defendant than those earlier-filing defendants. The relationship among these observations and outcomes can be expressed by the following

[16] Mr. Hanley testified that "Turner and Newall was … actually the largest asbestos manufacturing company in the world, larger even than Johns-Manville." (Tr. p. 3405.)

"law," to be known as "Peterson's Law" – an asbestos defendant's expected total asbestos Section 524(g) trust funding commitment is inversely proportional to the strength of that defendant's tort system defenses and its proportional share of liability in the tort system at a time when all asbestos defendants were still defending in the tort system.

The proposition of "Peterson's Law" is so strikingly counterintuitive it should be asked why it was not noticed sooner in earlier Chapter 11 cases. Coltec suspects and submits that in the Chapter 11 filings that occurred in the period between 1998 and 2006, bankruptcy courts were still dealing with what Dr. Peterson commonly refers to as the "major" defendants (Tr. pp. 3857, 3859) and, probably more importantly, the courts were administering many of the Chapter 11 cases of those "major" defendants simultaneously. Plans were being negotiated, estimations were being conducted, and trusts were being established in multiple cases along similar timelines, such that the effects of prior bankruptcies on the processes of those contemporaneously developing cases were necessarily less apparent. Put another way, it was hard to grasp the concept of the potential cumulative impact of the "bankrupt share deficit" because so many cases were proceeding through the bankruptcy process at roughly the same time.[17] Now though, looking back from 2013, the process of liability transfer that has resulted from the successive bankruptcy filings that occurred in the 1990s and 2000s can be understood and its results seen in the evidence of the attached chart.

**F. The Inherent Unfairness of the "Standard" Methodology and its Disconnection from the Scientific Evidence Presented at Trial Highlight the Critical Importance of Systemic Proportionality in the Court's Analysis.**

What, then, should the Court make of this and how should its estimation of Debtors' mesothelioma liabilities take account of this phenomenon? Whether the Court accepts or rejects

[17] Of the twenty-five Section 524(g) trusts identified on the chart, only four were established for defendants filing for bankruptcy prior to 2000.

Drs. Peterson's and Rabinovitz' methodologies for claims estimation, in whole or in part, Coltec submits that it must adjust those methodologies and the results derived therefrom to avoid the inequitable consequence whereby multiple sequential bankruptcy filings by Debtors and other asbestos defendants magically increases Debtors' liabilities to asbestos claimants. At this juncture, the relevance and importance of the evidence Debtors offered in the fields of industrial hygiene, epidemiology, and pathology is also brought squarely into view.[18]

The Court should not sanction an estimation methodology or a resulting estimation that would require these Debtors to fund a Section 524(g) bankruptcy trust far more generously than was required of the manufacturers of friable amphibole insulation products, simply because these Debtors managed to use their stronger defenses to negotiate more favorable settlements, lose fewer verdicts, and thereby avoid bankruptcy for a longer period of time. If we take Dr. Peterson at his word, that asbestos litigation and claims resolution is a "system" in which all parts relate to and are affected by all other parts (Tr. p. 3853), then it is most certainly legitimate, and even essential to the concept of equity, that this Court consider matters of proportionality and disproportionality in the allocation by the bankruptcy "system" (or "industry") of the liabilities that multiple asbestos debtors have to a common pool of asbestos claimants.

The Court should not adopt an estimate that would sanction the systematic distortions described above (as further amplified by the "bad acts" of some participants in that system); it should instead consider the concept of proportionality of liability across the entire field of asbestos defendants and debtors. The Court should use the notion of "systemic proportionality" to adjust for the distortions described above and to recognize and take into account Garlock's

[18] For example, substantial downward adjustments are warranted due to the fact that the science case summarized by Debtors at the Trial demonstrated that the universe of claimants that could have been exposed to Garlock's encapsulated gaskets is very small – the "blip" beside the "big red balloon." (Ex. GST-16007, slide 54.)

proportionate liability share when all asbestos defendants were still defending in the tort system.[19] By doing so, the Court will ensure that the relative liability shares of the multiple asbestos defendants are not distorted by the simple fact that the different defendants entered the bankruptcy claims resolution "system" at different times and in different sequence. As we quoted him at the outset, counsel for the ACC posits that "[t]he bankruptcy court does not sit to rearrange the economic factors working on litigants outside of the bankruptcy court." (Tr. p. 144.) Whatever else may be said about this, at least one piece of it is true – bankruptcy courts do not sit to create and validate *new* distortions in the factors working on litigants outside of bankruptcy courts. The estimation methodology employed by the Claimants' experts would do exactly that.

## II. IGNORING RECENT, RELEVANT INFORMATION FROM CURRENT CLAIMANTS FURTHER EXPOSES THE CLAIMANTS' EXPERTS' METHODOLOGY.

The distortion and self-collapsing tenets of Peterson's Law, combined with Dr. Heckman's rebuke of the Claimants' experts' unscientific method, are sufficient for this Court to give little or no weight to Dr. Peterson or Dr. Rabinovitz and their conclusions. However, the Trial revealed other weaknesses and failures in their methods that illustrate additional matters of concern for this Court in the estimation and bankruptcy process. The deficiencies are symptoms of the disease of the "standard" methodology.

If the Court had heard only the direct examinations of the witnesses for the Claimants' Representatives, it would have missed the fact that the Trial was preceded by an important process of discovery and evidence gathering involving the personal injury questionnaires and the

[19] The phrasing "systemic proportionality" takes its cue from and gives a nod for its origins to the Claimant's similar succinct coinage – "temporal propinquity." (Tr. pp. 4087 - 4091.)

supplemental questionnaires (collectively, the "PIQs"), and the limited discovery obtained from certain of the previously established Section 524(g) trusts. As a result of that discovery, much more is now known about the characteristics of the pool of present claims – information that should also be utilized to assist the Court in forecasting the characteristics of the pool of future demands. Though they struggled mightily to do so, both of the Claimants' experts failed to articulate any persuasive reason why the wealth of information contained in this discovery should be ignored in the estimation process.[20] Nor are the Claimants' Representatives able to call upon any line of authority that would sanction ignoring in the process of claims estimation known facts concerning relevant and material characteristics of the claims held by the pool of claimants. Indeed, were the Court to accept estimations that not only ignore known facts but actually assume the contrary of those facts, it would transgress the fundamental rule that Debtors' liabilities must be estimated following the substantive law applicable to those claims. *See In re USG Corp.*, 290 B.R. 223, 225 (Bankr. D. Del. 2003) ("It is basic that federal bankruptcy jurisdiction does not oust state law governing claims on a debtor's estate. . . . An unbroken line of authority holds that state law claims remain governed by state law, even after the debtor invokes federal bankruptcy protection."); *see also* 11 U.S.C. § 502(b)(1) (directing that claims "unenforceable against the debtor and property of the debtor, under . . . applicable law" shall not be allowed in bankruptcy).

Because of the information available from the PIQs and other pre-hearing discovery, the parties and the Court are neither required nor permitted to treat the pool of present claimants as if they were an undifferentiated group of typical claims drawn from some representative slice of

[20] Dr. Rabinovitz' only defense of her decision not to consider or use the data from the PIQ's was, in substance, her mantra that "that's not the standard way of doing it." (Tr. pp. 4168-4169, 4351-4353.) Her lack of curiosity about the available information – e.g., - what do the PIQ's say, why have settlements shown the patterns and trends they seem to display, and so on – is in fact her distinguishing mark as an "expert" witness.

the past (i.e., a "calibration" period). The parties and the Court instead can and should base their estimation on the known facts about an existing group of claims. Neither Dr. Peterson nor Dr. Rabinovitz did this.[21] Dr. Bates did.

Nothing better illustrates the point here than the testimony, and especially the cross-examination, of Dr. Gallardo-Garcia. Dr. Gallardo-Garcia carefully compared the results of the PIQs with the information in the Debtors' pre-PIQ database, making adjustments in the database information to reflect information obtained from the claimants themselves or their counsel concerning the nature of their diseases, the status of their claims against Garlock, and whether or not they claimed any exposure to Garlock's asbestos-containing products. On cross-examination, the ACC's counsel attempted to develop the point that Dr. Gallardo-Garcia's adjustments were improper because they could potentially conflict with or produce results that would vary from the different approach to Debtors' claims database employed by the Claimants' experts. In that alternative approach, adjustments to the claimant data were made based on historical patterns of correction to and adjustment of Garlock's pre-petition database over a period of years. Put into other words, the approach taken by the Claimants' experts was to develop the characteristics of the *current* claims pool by *forecasting and then making adjustments to the database based on how Garlock's claims database had evolved and been adjusted over times in the past.* Such an approach is like painting a portrait from photos of the subject's parents even though the subject is present in the studio in front of the artist.

Whether and to what extent the past is a reliable guide to the future, Dr. Gallardo-Garcia was most certainly correct when he rejected the legitimacy of projecting the past onto the

[21] Dr. Rabinovitz decision to ignore the available data concerning present claims and claimants was admittedly not complete. It was selective; she chose to supplement the Garlock database with materials provided in Garlock's answers to interrogatories but not with information provided in the PIQs.

*present,* instead of using the actual data at hand from the PIQs: "Well, as a matter of any scientific process, if you can observe the actual event, you don't try to forecast it." (Tr. p. 4713.) Dr. Gallardo-Garcia's answer is impeccably correct: the Court should not construct a hypothetical pool of existing claims (using only simple extrapolation of historical data) and then attempt to predict their characteristics for purposes of estimating their value.

In every story there are at least two narratives. There is the narrative of the events themselves – what happened? And there is the meta-narrative – the context that explains why those events happened as they did. Here the meta-narrative is interesting – just why did Claimants' experts choose to ignore the data from the PIQs and other discovery developed over recent months? Their superficial answer – that they could not be sure the PIQ data or the claims data from the trusts are accurate – is unconvincing and is, in fact, preposterous. How could information supplied by claimants and their counsel be less accurate than information recorded in the Garlock claims database, which may have been based on second-hand and unverified sources?[22] The answer to this meta-narrative emerges again from the cross-examination of Dr. Gallardo-Garcia and from the rebuttal testimony of Dr. Bates: the problem is that the PIQ data is not consistent with the predictions of the "standard" model for claims estimation, and, perhaps more glaring, the PIQ data exposes the error of just using recent settlement data to extrapolate to a single point estimate for all current and future mesothelioma claims. The PIQ data also pull back the curtain on the plaintiffs' asbestos "industry," albeit just a little, but even a glimpse

[22] Objections to the quality of the data contained in the PIQ's and other discovery are particularly ironic in the case of Dr. Peterson, whose testimony in support of his own estimation was larded with numerous references to sources of data to which he had access but that he was unable to make public. (E.g., Tr. p. 3883, "[y]ou do not look at events that happened in the bankruptcy because those aren't in the tort litigation and my experience of 20-some years of doing this."; Tr. p. 3856, "I've heard in this court that they had 60 percent of the liability. I've had a fair amount of experience with Manville. I've typically never heard numbers that high; more in the range of 20 to 40 percent."; Tr. p. 3864, "[b]ut Pittsburgh Corning – I can't display their data, its private, but their payments were not dissimilar to Owens Corning.").

compels further inquiry and a subsequent demand for transparency that the "standard" method would not withstand.

The PIQ data reveal that the group of "present" claims – those outstanding as of the petition date – contains fewer mesothelioma claims, fewer actual claims asserted against Garlock, and fewer unresolved claims than is indicated by the claims database. By refusing to adjust their analysis based on actual data, errors in settlement amounts and model rates occurred. Simply compounding only these errors over time, the Debtors' experts believe Dr. Rabinovitz' estimate of total claims is overstated by $80 million and Dr. Peterson's estimate of total claims is overstated by $190 million. As Dr. Bates testified, the pool of present claims also has characteristics that diverge from the claims that compose the "calibration periods" of the Claimants' experts: the unresolved claims are on average older (outstanding for a longer time) and were from a different group of jurisdictions than the claims used for the "calibration" periods.

To have acknowledged the adjustments required by the PIQ data and to have taken into account the ways in which the known characteristics of the present claims differ from claims that comprise the "calibration" periods would have required more complex and nuanced models for estimation than the naïve linear extrapolations offered by the Claimants' experts. Put another way, taking into account the reasonably available facts about the pool of present claims would have revealed the estimation methodologies employed by the Claimants' experts to be inadequate to the task at hand and, moreover, would have produced estimates lower than those generated by ignoring that information.

## III. THERE IS REAL VALUE TO THE CLAIMANTS' QUESTIONNAIRE DATA THAT SHOULD NOT BE IGNORED.

Taking account of the facts about the present claims knowable from the PIQs permits an estimation of claims that is more congruent with the purposes for which an estimation of those claims is needed at the present juncture, with consequences not just for the dollar amount assigned to such claims as an aggregate estimation. For present claims, estimation for purposes of "allowance" under Section 502(c) is critical to questions of plan classification, plan voting, and in order to determine whether the anti-discrimination and class acceptance requirements of Section 1129 can be or are satisfied. Estimation based on actual data – including not only Garlock's database but also the data available from the PIQs – permits the estimation to answer the following questions that are pertinent to plan formulation and plan confirmation:

(a) Should claimants who report in their PIQ responses that their claims are settled but not yet paid be included in the estimation of contingent and unliquidated tort claims, or are such claimants instead the holders of non-contingent, liquidated general unsecured claims? *E.g., In re Continental Airlines,* 981 F.2d 1450 (5th Cir. 1993)(estimation is in appropriate where claim is neither contingent nor unliquidated). This is a question that goes to the classification of claims and determining who may be eligible to vote in the class or classes of asbestos tort claimants.[23]

[23] Claimants whose PIQ's reported that their claims are settled but have not yet been paid fall into two subgroups – those whose settlements are acknowledged by Garlock and those whose settlements are disputed by Garlock. In the case of claimants whose claims are acknowledged by Garlock as being settled but simply not yet paid due to the intervention of bankruptcy, there should be no dispute that those claims should be excluded from the "estimation" of current contingent and unliquidated claims: they are neither "contingent" nor "unliquidated." In the case of claimants who contend that their claims are settled but the fact of settlement is disputed by Garlock, here again the claims do not belong in the group of contingent and unliquidated claims that should be estimated as present claims *for so long as their status as settled or not settled remains undetermined.* Resolution of the dispute as to whether or not a claim has been settled requires evidence of a kind not presented at the Trial, and presuming – without evidence – that such claims have not in fact been settled and therefore must be estimated improperly inflates the estimation of the current claims. Dr. Rabinovitz is most certainly correct in her view that the status of these claims must be resolved one way or the other, but there is simply no foundation in the law or the evidence for "resolving" them by *(continued on next page)*

(b) Should claimants who responded to their PIQ affirmatively stating that they assert no present claim against Garlock be included in the aggregate estimate of present mesothelioma claims? This, too, is a question that goes to the classification of claims and also to the matter of eligibility to vote on a plan of reorganization.

(c) Should claimants who failed to identify in their PIQ responses any exposure to any Garlock product be valued at zero for purposes of plan classification and voting purposes? *E.g., In re Frontier Airlines*, *Inc.,* 137 B.R. 811 (D. Colo. 1992)(estimation of claims may result in determination that claims have no value). This is a question of what claims are to be included in the aggregate estimation or, alternatively put, how claims having certain known characteristics are to be treated in the estimation methodology. The Debtors' presented persuasive evidence that not all mesothelioma claimants will have the same likelihood of proving allowable claims when the time comes for actual individual claims allowance. (Tr. pp. 2841-2845.) Groups of claimants, based on their occupational and exposures histories, will have different likelihood of being able to establish claims against Garlock in *any* amount. Accordingly, may the occupational histories of groups of claimants as determined from the PIQ data be taken into account for purposes of classification of claims under 11 U.S.C. § 1122?

Were the Court's estimation decision to provide guidance on these questions, even without settling on some single number as the estimated amount of the present claims, it would

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*(continued from previous page)*
inflating an aggregate estimate of the pending contingent and unliquidated claims against Garlock. These claims should be excluded from any estimation and reserved for a separate proceeding in which the question of settlement *vel non* is first decided. Dr. Rabinovitz actually appears to acknowledge that these claims likely should not be "estimated" using the methodology she and Dr. Peterson otherwise apply to the estimation of current and future claims. (Tr. pp. 4189-4190.) As she testified, if they are not "estimated" then then need to be "valued" in some way and taken out of account. In her own roundabout way, she is acknowledging that settled but not paid claims are simply not in the same class as are truly contingent and unliquidated claims within the meaning of Section 502(c).

materially assist the parties in their negotiations and in the formulation of a potential plan or plans of reorganization.[24]

## IV. UNCERTAINTY AND THE LACK OF SCIENCE RENDER CLAIMANTS' EXPERTS' OPINIONS USELESS.

The evidence adduced at the estimation hearings disclosed that the estimation methodologies advocated by the Claimants' Representatives produce results that are subject to great – and as Coltec argued in its Brief in Support of Debtors' *Daubert* Motion, unacceptably great – statistical uncertainty and variability. (Tr. pp. 4250-4256; Coltec Industries Inc.'s Memorandum in Support of Debtors' Motion to Exclude or Strike Committee and FCR Estimation Expert Witness Opinions (D.E. 3156), pp. 8-11.) This is necessarily so for the estimation of future demands because of the extended period of time covered by the projections and the year-over-year compounding effect of statistical errors and uncertainties that are embedded in the estimates for the initial years of the period. (Tr. pp. 4251-4253.)

The Claimants' Representatives would have the Court ignore these compounding problems and blindly accept their experts' methods as "standard." However, Dr. Heckman exposed the myth that the forecasting of future asbestos claims is subject to a separate or privileged set of principles or rules. He explained:

[24] There is a secondary conclusion that can be derived from the evidence presented by the parties with respect to the valuation of present claims. Though the question of Garlock's solvency is not presently at issue and has been reserved, all the evidence from the contending parties presented confirms that the Garlock is manifestly not insolvent if only present claims are considered. The estimates presented range from Dr. Bates' "not greater than $25 million" to Dr. Peterson's $229.7 million, based on his use of Garlock's database unadjusted for information obtained from the PIQs. The Debtors currently have available to them in excess of $134 million in uncommitted, free cash or cash equivalents as of August 24, 2013. Monthly Status Report for Garlock Sealing Technologies LLC filed October 3, 2013, p. 2 (D.E. 3170). Coltec submits that any effort by the ACC's to drive the reorganization process and the structuring of any 524(g) trust should be viewed with some caution in view of the fact that the ACC's constituency can be fully accommodated in a traditional plan of reorganization without the mechanisms of Section 524(g). This is, in fact, what Garlock's currently proposed plan of reorganization contemplates, and the evidence at the estimation hearings did nothing to undermine that plan concept.

> The crucial thing is there's a unifying set of principles across areas. It's not like there's a statistics for asbestos and statistics for chemistry, a statistics for cancer or something of the sort. There are general principles of statistical inference and procedures that are used – that are accepted principles by scholars who are competent in these fields. (Tr. p. 4233.)

Even if the Claimants' experts' estimation methodologies survive their *Daubert* challenge and are admitted, Dr. Heckman's studied examination of the proffered methodologies found that they do not provide the Court with credible predictive power. (Tr. p. 4236.) Mark Twain, quoting the British Prime Minister Benjamin Disraeli, announced that three basic lies exist – "lies, damn lies, and statistics." *See* Mark Twain, *Chapters from My Autobiography*, North American Review (September 7, 1906). Apparently, Disraeli and Twain were wrong – there are four lies: lies, damn lies, statistics, and "asbestos statistics."

The difference between the Claimants' experts themselves, both claiming to use the same methodology, illustrates the point about variability and the real risk of accepting their methods. Excluding from the estimate of Dr. Rabinovitz the amount attributed by her to hypothetical payments to be made to future defense counsel, the difference between Claimants' experts with respect to their estimates of the net present value of future demands is approximately $483,000,000, with Dr. Peterson's primary estimate being 61.76% higher than Dr. Rabinovitz' base case estimate.[25] This difference is attributable to very small differences in the initial assumptions, initial variables, and the adjustments made to the initial data. *Cf. In re Armstrong World Indus.,* 348 B.R. at 133 (recognizing the same point and cautioning against overly precise focus on single point estimates); *Owens Corning v. Credit Suisse First Boston*, 322 B.R. 719, 721 (D. Del. 2005).

[25] The comparison here is between Dr. Peterson's primary forecast and Dr. Rabinovitz' base case, excluding that portion of the defense costs attributable to future claims. The comparison uses the net present values.

The variability problem manifests internally for Claimants' experts' analyses as well. For example, Dr. Peterson created two forecasts in his report—a "Primary Forecast" and a "Secondary Forecast." (Tr. pp. 3901-3902.) According to Dr. Peterson, if he simply used the "calibration period" of 2003-2010 instead of 2006-2010, his forecast would be reduced by almost a quarter billion dollars on a nominal basis. (ACC-628.)[26] Dr. Peterson increased claimants' propensity to sue Garlock for 4.5 years after his calibration period, increasing his forecast by $130 million. His sole reason for applying this increase was (as he stated in his report) that he found the ultimate estimate he obtained by his own methodology without the trend to be "implausibly low." This was detailed by Dr. Bates when criticizing Dr. Peterson's expert report, pages 27-28. (Tr. pp. 4763-4764.)

Dr. Heckman cautioned that the variability in the "standard" method rendered it unreliable and, essentially, useless. (Tr. pp. 4236, 4250-4251.) Coltec also submits that the high degree of uncertainty that especially affects the estimation of future demands cautions against selecting a single, point estimate and counsels instead that the evidence warrants, and indeed likely can only support, an estimation result that is a range of values for the total future demands against Debtors. Such a range of values, rather than a single, artificially precise number, would not be inconsistent with the purposes for which an aggregate estimation of future demands is presently needed in these cases. Future demands will not be classified in a plan or, if so classified, will be placed in a single class. The holders of future demands, because they are unknown and unknowable, will not be voting on a plan of reorganization. Their claims, if and

[26] The only reason articulated by Dr. Peterson for why he used 2006-2010 as a "calibration period" was his reliance on the concept of "temporal propinquity," a concept for which he offered no support and which Dr. Heckman testified does not exist. (Tr. pp. 3884, 4987.)

when they do materialize, will likely become allowable and allowed only long after a plan of reorganization has been confirmed.

Because the matters of classification and voting that would otherwise require an estimation for purposes of "allowance" under Section 502(c) are not in play with respect to the future demands, the lack of a more precise estimate will not impede the development and structuring of any plan of reorganization. How, though, does this fact about the uncertainty of the estimates of future demands play into the tasks before the Court and the evidence submitted by the parties at the Trial? To that question we next turn.

## V. ESTIMATION AND "FEASIBILITY" – THE CLAIMANTS' EXPERTS COME TO A DEAD END.

As noted earlier in this Brief, the Estimation Order contemplates at least two purposes for an aggregate estimation – for allowance under Section 502(c) (Estimation Order ¶ 9) and in order to assess the feasibility under 11 U.S.C. § 1129(a)(11) of any plan of reorganization offered for confirmation (Estimation Order ¶ 10). While they are to some degree congruent, the two concepts are not identical, and it is the differences between them that are important for present purposes.[27] Claims that are estimated under Section 502(c) become "allowed" claims for all purposes for which allowance matters under the Code – for purposes of classification of claims, for purposes of voting on a plan, for purposes of applying the "best interest of creditors" test of 1129(a)(7), for purposes of applying the "unfair discrimination" and "absolute priority" rules

[27] During the course of the estimation hearings, counsel for the FCR introduced yet a third concept into the mix, one that is neither "allowance" nor "feasibility." We will refer to it as "acceptability" – can a plan of reorganization secure the necessary support of the relevant constituencies required for its confirmation? In not so subtle fashion, counsel for the FCR suggested that unless an aggregate estimation reaches or exceeds some particular dollar amount, no plan could receive sufficient support to be confirmed. (Tr. p. 99.) Whether or not such an insinuation is proper argument, it is most certainly premature. Many considerations go into decisions by claimants and groups of claimants to support or oppose a particular plan of reorganization, and the course of negotiations that precede and are embodied in the provisions of a plan of reorganization usually involve many instances of compromise and give-and-take. Counsel's suggestion that "acceptability" must dictate the results of an aggregate estimation is only special pleading; it offers nothing about either "allowance" or "feasibility."

under 1129(b), and for purposes of receiving distributions under the plan. "Allowance" answers the question whether claimants hold claims that could be adjudicated in their favor under applicable substantive non-bankruptcy law.

The different question of "feasibility" involves matters that are predominantly practical ones. Will the mechanics of the plan actually work as they are intended? Is the plan's level of funding sufficient so that a return to reorganization or liquidation will not be necessary? The two inquiries – allowance and feasibility – only imperfectly overlap. Certainly, a plan that will be not be funded at a level adequate to make the promised plan payments to allowed claims will not be "feasible," but conversely a plan may be "feasible" so long as it is funded at a level sufficient to make those promised payments, *even if the proposed payments are less than the **allowed** amount of the claims treated in the plan.*

The Debtors' witnesses persuasively explained why the estimation methodology advocated by the Claimants' experts is flawed when offered to estimate claims for purposes of allowance under 502(c). Here Coltec wishes to make the point, not directly addressed at the Trial: that the "standard" methodology of the Claimants' experts likewise offers nothing useful on the issue of plan feasibility. This is a feature of the methodology itself; it is not simply a failure of proof or of evidence. Inherent in the so-called "standard" methodology is the premise that reorganization does not occur, that a bankruptcy filing did not happen, and that the claims resolution process under any confirmed plan of reorganization will exactly duplicate the pre-bankruptcy tort litigation process for all time. Such an estimation methodology of extrapolation cannot speak to the question of "feasibility" because it assumes away the very existence of reorganization under a confirmed plan. Although the Estimation Order states the Court's then-held view that the differences in estimation methodology advocated by Debtors on the one hand

and by the Claimants' Representatives on the other hand are matters of evidence and not matters of law (Estimation Order ¶ 19), now that the estimation evidence has been presented and the record concluded, Coltec respectfully submits that this cannot be correct.

This is not to take the position that Garlock's settlement history has no evidentiary value whatever. Dr. Bates himself used Garlock's settlement history to assist in constructing and scientifically validating the results of his own model.[28] It is instead a critical observation regarding the structure and validity of the model that uses pre-bankruptcy settlements as directly determinative of what will be paid out under a plan of reorganization; it is about the value of the result, or lack thereof, that can be obtained from simply projecting pre-bankruptcy settlement data into the future.

At its core, all that the "standard" methodology can possibly offer on the question of "feasibility" is a "worst case" scenario – what amount would need to be funded in a plan of reorganization that proposes to pay *100%* of the *pre-petition* settlement value of *all asserted claims* and that makes *no changes whatever* in the process by which claims are submitted, evaluated, processed, and resolved from the litigation settlement bargaining that occurred prior to bankruptcy. While this result may have some academic interest, it has virtually no practical

[28] For example, by reviewing pre-petition settlement history, Dr. Bates was able to statistically prove that in an effort to avoid avoidable costs, settlement payments rose even though Garlock's actual legal liability based on all the evidence did not change. He believed that the defendant's avoidable costs were much higher than the plaintiff's avoidable costs. Dr. Bates corroborated this fact testimony using accepted econometric techniques. He first observed that actual trial outcomes—jury verdicts—vary strongly and reliably with the age of the plaintiff, with younger plaintiffs receiving approximately four percent per year more than older plaintiffs. Avoidable costs, on the other hand, do not vary with the age of the plaintiff. Thus, by examining how Garlock's settlements varied with the age of the plaintiff, Dr. Bates was able to determine the extent to which Garlock's settlements were driven by the expected outcome of litigation as opposed to the avoidable costs. If, for example, settlements also decreased by four percent per year of plaintiff age, that would show that settlements were driven by expected outcomes of litigation (which vary by plaintiff age), and invalidate Dr. Bates's hypothesis based on the Law and Economics model. If, on the other hand, settlements decreased by less than four percent per year of plaintiff age, that would show the settlements were also driven by avoidable costs to a greater or lesser degree. The result of the age test confirmed Dr. Bates's hypothesis. (Tr. pp. 2763-2770.)

utility on the question of whether the plan previously proposed by Debtors, or some other plan yet to be developed and proposed, is or will be found "feasible."[29]

"Feasibility," as noted above, is a practical concept, and for that reason it necessarily requires consideration of the incentives and disincentives that determine the choices and actions of claimants and other constituencies in the cases. Neither of the Claimants' experts attempted to model, project, or forecast how those incentives and disincentives will or may change under a plan of reorganization from what they were under the pre-bankruptcy regime. Only Dr. Bates made any attempt to address these questions in his testimony and work concerning the feasibility of the Debtors' current proposed plan of reorganization. (Tr. pp. 2846-2851.)

The Claimants' experts were silent because their estimation model does not permit them to consider how and to what extent the incentives and disincentives facing the parties and their resulting behaviors will change under a bankruptcy reorganization regime. Dr. Heckman's criticism of these experts' lack of inquiry about changing behaviors was particularly apt, since forecasting in the face of changing behaviors is precisely the work he did to garner the Nobel Prize in Economics. It is also the field of expertise of Dr. Bates, and admittedly not at all an area of knowledge of the Claimants' experts. (Tr. pp. 4007, 4290.) The evidence is uncontradicted, however, that constituent behaviors, among other factors, will in fact change in reorganization. The most obvious example of this fact is that claims will be processed and paid through an administrative mechanism that will not require Debtors, or a Section 524(g) plan trust, to employ

[29] There is one "feasibility" conclusion that can be deduced from the estimations offered by Drs. Peterson and Rabinovitz, but it is a trivial one: a plan that proposes to pay, and is backed by a funding mechanism adequate to pay, at least as much or more than their estimates will satisfy Section 1129(a)(11) as a matter of law.

and pay outside defense counsel to defend and settle claims. Dr. Rabinovitz' inclusion of such costs in her estimation – amounting to 34.4% of her total estimate – is simply absurd.[30]

There is a second, more fundamental sense in which reorganization will change claiming and claims resolution behaviors in ways that necessarily affect the estimation of, quoting from the Estimation Order, "the aggregate amount of money that Garlock will require to satisfy present and future mesothelioma claims." (Estimation Order ¶ 10.) Dr. Bates' testimony compellingly demonstrated that the overwhelming majority of Garlock's pre-bankruptcy settlements were determined by the very rational decision to avoid expected litigation costs, and his empirical modeling of that fact was buttressed by the testimony of lay witnesses including Mr. Magee, Mr. Glaspy, Mr. Turlik, and by other expert witnesses such as Dr. Brickman. Dr. Bates' conclusion that pre-bankruptcy settlements for less than $200,000 were all explainable by cost avoidance and not liability risk stands essentially unrebutted.

Equally unrebutted is the fact that those considerations that enter into the calculation of litigation cost avoidance will not be operative in a post-reorganization environment: (a) there will be no bundling of claims, with high value claims driving settlement values for groups of lesser value claims; (b) there will be no manipulation of venues, trial dockets, and skewed selection of scheduled cases for trial, each driving up the uncertainties and therefore the costs of

[30] Her attempts to justify inclusion of this item in her estimate merely served to undermine her general credibility as an expert witness. She offered three "justifications." First, she acknowledged in substance that she had included defense costs in her estimate of Garlock's future "liabilities" because in this case, unlike in some other bankruptcy cases, *solvency is at issue.* (Tr. pp. 4291-4294.) Second, she offered the lame explanation that defense costs are a surrogate for the costs of administering a Section 524(g) trust. (Tr. pp. 4294-4297.) This bit of nonsense was exploded by the evidence that the actual administrative costs of Section 524(g) trusts have historically been only a fraction of the costs to have defended and either tried or settled the same pool of claims in the tort system. (Tr. pp. 4759-4761.) Finally, she claimed that "some companies" accrue expected future defense costs in their financial statements, while others pay them on a current basis and show them as a current expense. This accounting option, she contended, justified her inclusion of future defense costs in her estimate, ignoring, however, the undisputed fact that these Debtors did not accrue future defense costs for financial statement reporting purposes. Her explanations were an embarrassing effort to disguise a results-driven approach to her "estimation."

trial preparation; and (c) there will be no concealment of alternative sources of compensation for claimants. Only Dr. Bates attempted to take these reorganization-based changes in the claims resolution environment into account.

The Claimants' Representatives ignore feasibility altogether because any attempt to bring that issue under analysis only exposes the lack of credibility in their methodologies. Their error of ignoring these reorganization-based changes in the claims resolution process and the claims resolution environment is serious and fundamental. As Judge Robreno similarly cautioned in the *Armstrong* case:

> [w]hile it is true that to attempt an estimation without utilizing information known about these debtors and their history in the handling of claims which have been asserted against them in the past, and their disposition, is to ignore a valuable resource, it is also true that 'adjustments should be made to historical values to account for … probable changes. The challenge is to strike the proper balance between the two - the debtor's history and the probable changes in the litigation landscape - while keeping in mind the uncertainty of predicting how future claims would be resolved.

*In re Armstrong World Indus*., 348 B.R. at 124 (internal citations omitted).

Coltec anticipates that the Claimants' Representatives will certainly object to the foregoing discussion, arguing that it violates the principle announced by, among others, Judge Fullam in *Owens Corning,* 322 B.R. at 721-722, that what is to be estimated are claim values in the tort system and not claim values under a reorganization regime. The objection would be beside the point being made here, which is that an estimation of claims that does not take into account changes in claims resolution processes and procedures wrought by a plan of reorganization cannot possibly be determinative, or even very useful, in answering the question of "feasibility" of a plan. No better evidence of the truth of this is that Judge Fullam in *Owens Corning* estimated that $7 billion was a reasonable approximation of Owens Corning's present and future asbestos liabilities; yet a plan of reorganization for Owens Corning was confirmed

(and therefore found to be feasible) that provided for total Section 524(g) trust funding of less than $3.5 billion.[31]

Fundamentally, an estimation that simply copies the pre-bankruptcy claims resolution processes and environment will *overestimate* the amount needed to fund a feasible plan of reorganization, and if that overestimate is then used to construct and present for confirmation a plan of reorganization, it will encounter serious confirmation difficulties with respect to the rights of junior classes, including equity, under 11 U.S.C. § 1129(a)(7) and under § 1129(b)(2). *E.g., In re Exide Techs.,* 303 B.R. 48, 61 (Bankr. D. Del. 2003); *In re Genesis Health Ventures, Inc.,* 266 B.R. 591, 612 (Bankr. D. Del. 2001); *In re Mcorp Fin., Inc.,* 137 B.R. 219, 225 (Bankr. S.D. Tex. 1992). These are difficulties Coltec has briefed previously in the course of these Chapter 11 cases and will not be repeated here. (*See* Response by Coltec Industries, Inc. to Joint Brief by Asbestos Claimants' Committee and Future Claimants' Representative as to Claims Estimation Issues, filed March 22, 2012. (D.E. 2049).) Suffice it to say that the Trial did not cause these difficulties to disappear, and the Claimants' experts' blind eye and deaf ear to the matter render their calculations useless for purposes of determining the amounts that will be required to satisfy present and future claims under a plan of reorganization.

Overestimation, as advocated the Claimants' Representatives by virtue of their ham-fisted methodology, is a bell that cannot be unrung.[32] Add to that truism a process – also

[31] Judge Fullam's discussion of this issue is a good illustration of how imprecision in the expression of an idea can engender tremendous resulting confusion. Taking the absolutely unexceptionable proposition that "state law governs the substance of claims," he reasons to the conclusion that what is to be valued is "what would have been a fair resolution of the claims in the absence of bankruptcy." *Owens Corning,* 322 B.R. at 721, 722. But the latter expression is far removed from the first formulation. The first expresses a statement about the principles of substantive law that determine the allowability of a claim; the second expresses a statement about what the parties to a disputed claim might have considered to be a fair settlement of the disputed claim. In the mismatch between these two forms of expression lies the core of the difference between the methodology employed by Dr. Bates and that employed by the two Claimants' experts. And it is therefore why the methodology employed by the Claimants' experts inherently cannot speak to the question of the "feasibility" of any plan of reorganization. *See also* RAND Report, Appendix B, Detailed Reports on Largest Trusts, pg. 145.

advocated by the Claimants' Representatives – that sets a funding number before claims are actually liquidated, and the ringing bell becomes an anvil on which junior interests are flattened. Thus, the "system" chugs along, and the "standard" methodology further entrenches, lying in wait for the next, even less culpable defendant to files its bankruptcy petition and receive its artificially inflated "standard" estimation.

## VI. BRINGING IT ALL TOGETHER – "ALLOWANCE," "FEASIBILITY," AND CONNECTING UP THE VARIOUS AGGREGATE ESTIMATIONS.

There is a better path forward. The evidence presented by Debtors at the Trial provides a roadmap by which the Court can arrive at a fair aggregate estimation of both the Debtors' actual liabilities for purposes of Section 502(c), that is, liabilities determined according to the rules of non-bankruptcy substantive law, *and* the likely amount that will be required to resolve those liabilities under a feasible plan of reorganization. Doing this requires, as Dr. Bates demonstrated, making the difficult, but necessary, effort to recognize the difference between and then examine the distinct and separate evidence that goes to the question of claims *valuation*, and the evidence that goes to the question of the amount that will be required to *resolve* a pool of claims whose characteristics indicate some specified *valuation*. Put somewhat differently, and to return to the point with which we opened this Brief, applying the two different concepts of "claims valuation" and "costs of claims resolution" to the evidence presented at Trial requires acknowledging that no aggregate estimation number has any meaning independent of the context in which it is being offered. The effort to derive a single aggregate number that answers all questions and works for all purposes is futile. Dr. Bates' work both acknowledges this

*(continued from previous page)*

[32] It is inevitable that in an overfunded plan, the number and "value" of the claims presented for payment will grow to equal the amount of funding available. If, by contrast, a plan proves to have been underfunded at the opening, mechanisms can be built into a plan of reorganization that will provide for later, additional funding based on specified contingencies.

complexity and provides the needed tools for the Court to utilize in accomplishing the multiple purposes of an estimation.

The Debtors' post-trial brief summarizing the Trial evidence lays out the compelling case why Dr. Bates' methodology is the only one that answers the correct *valuation* question: what would Debtors' liabilities be if they were to be determined under applicable substantive state law? The results of Dr. Bates' modeling of this question are admittedly not the results Debtors actually achieved while still operating in the pre-bankruptcy tort system, although they do closely model the results achieved when (a) most other asbestos defendants were also still defending in the tort system and (b) the information and disclosure regime was not marked by concealment and non-disclosure of evidence of alternative exposures. Dr. Bates propounded a theoretically and empirically well-grounded scientific theory of why this is so. In fact, only he attempted to do so, as Claimants' experts confined themselves to unhelpful and uninformative commentary that Dr. Bates' methodology was "untried" and "novel," but never themselves attempted to investigate or explore *why and how* the results modeled by Dr. Bates diverged from Debtors' pre-bankruptcy claims resolution history. Coltec submits that Dr. Bates' ability to demonstrate, using proper scientific and statistical methods, exactly how his estimation of claims *valuation* (read: "allowability" for purposes of Section 502(c)) connects to the Debtors' pre-petition claims *resolution* history, and why the Debtors' claims resolution experience changed over time is a powerful confirmation that his methodology correctly estimates the *allowable* amount of present and likely future claims, applying applicable principles of state substantive law to the valuation of those claims. Neither of the Claimants' experts made any similar attempt; both refused to participate in the exercise at all, lazily excusing themselves by simply stating that it was not possible to separate the concepts of "valuation" and "costs of resolution" at all.

Dr. Bates also provided the Court the key to finding a systematic connection between his own work and the Claimants' experts' aggregate estimations. Turning to Dr. Bates' rebuttal of the Claimants' experts, his systematic deconstruction of their estimations illustrated in Slide 44 of his Trial demonstrative is compelling. (Tr. pp. 4787-4803.) Using Slide 44 to summarize, he explained how the estimations provided by the Claimants' experts connect to the Debtors' pre-bankruptcy financial statement expenditure forecasts while they were operating in the pre-bankruptcy "settlement" regime, and how alternative rules and practices governing the disclosure of alternative asbestos exposures would lead to adjustments to those forecasts. His testimony permits some interesting conclusions about the costs of claims *resolution* (read: plan "feasibility") and how those conclusions relate to conclusions about claims *valuation*:

(a) First, a plan that requires claimants to fully and truthfully disclose all alternative exposures to asbestos-containing products (whether or not the alternative exposures result in claims against other asbestos defendants or trusts) and that provides for aggregate payments to present and anticipated future claimants of between $125 million and $200 million will certainly provide an amount sufficient to pay the Section 502(c) "allowable" amount (read: "value") of those claims.

(b) Second, the upper bound required for funding a "feasible" plan that (i) requires claimants to disclose and report fully all claims made against other Section 524(g) trusts and (ii) is structured to deter or prevent manipulation of the timing of trust claims and concealment of trust claims is likely close to $320 million. This amount is an "upper bound" because it works from suboptimal forecast *expenditures* rather than the more appropriate lower number, which is *allowable claims.* Regardless, Dr. Bates' corrections and well-reasoned adjustments to

Claimants' experts' calculations provide useful insight into possible ranges of numbers for the Court to consider in its estimation exercise.

(c) Finally, an combined aggregate estimation of present and future claims $320 million will reflect not only an overestimate of the *value* of the present and expected claims, but will also assume a plan of reorganization whose claims *resolution* processes and rules will perpetuate some or all of the information manipulation practices and some or all of the systemic distortions in the interplay between the bankruptcy system and the tort system that marked the Debtors' history in the period immediately preceding their bankruptcy filings.

The work of Dr. Bates – both in scientifically constructing an estimation methodology for Debtors and in deconstructing Claimants' experts' calculations, by discarding their disproportional and inequitable inflations and connecting their calculations to an applicable information regime – brings together and realizes the central concepts Coltec has tried to articulate in this Brief. As Dr. Heckman acknowledged and the Court can attest, "it is a very tough problem." (Tr. p. 4241.) However, the difficulty and complexity of the estimation issues at hand does not excuse defaulting to simplistic extrapolations and misapplication of distorted data, i.e., the "standard" methodology. Instead, the tough problem presented by these proceedings requires a scientifically disciplined approach with nuanced consideration of issues of proportionality versus disproportionality and certainty versus uncertainty. From the beginning, however, the task before the parties and the Court calls for an acknowledgment that these Debtors are in bankruptcy court for a reason, and any outcome that perpetuates the Claimants' Representatives' asbestos "system" cannot achieve any of the purposes of bankruptcy reorganization envisioned by the Bankruptcy Code or by this Court.

Respectfully submitted:

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**CERTIFICATE OF SERVICE**

I hereby certify that the foregoing was electronically filed with the Clerk of Court using the CM/ECF system, which will send notification of such filing to the following counsel of record, and was served via e-mail, to the following:

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# EXHIBIT A

| Debtor | Debtor Bankruptcy Filing (Date A) | Debtor Meso Trust Funding | Garlock Meso Settlement Payments Between Date A and June 5, 2010* | FCR Meso Estimate for Trust Funding | Garlock CombinedMeso Settlement Payments and Meso Trust Funding at FCR Estimate | Garlock Combined Meso Funding Over/Under Comparison to Debtor Meso Funding |
|---|---|---|---|---|---|---|
| ACandS | 2002 | $ 437,380,400.00 | $ 479,424,988.00 | $ 1,292,000,000.00 | $ 1,771,424,988.00 | $ 1,334,044,588.00 |
| API** | 2005 | $ 94,000,000.00 | $ 349,138,988.00 | $ 1,292,000,000.00 | $ 1,641,138,988.00 | $ 1,547,138,988.00 |
| Burns and Roe | 2000 | $ 103,260,000.00 | $ 522,832,988.00 | $ 1,292,000,000.00 | $ 1,814,832,988.00 | $ 1,711,572,988.00 |
| Swan Transportation** | 2001 | $ 119,900,000.00 | $ 504,108,988.00 | $ 1,292,000,000.00 | $ 1,796,108,988.00 | $ 1,676,208,988.00 |
| Plibrico | 2002 | $ 133,640,000.00 | $ 479,424,988.00 | $ 1,292,000,000.00 | $ 1,771,424,988.00 | $ 1,637,784,988.00 |
| J.T. Thorpe** | 2002 | $ 232,500,000.00 | $ 479,424,988.00 | $ 1,292,000,000.00 | $ 1,771,424,988.00 | $ 1,538,924,988.00 |
| Federal Mogul | 2001 | $ 381,000,000.00 | $ 504,108,988.00 | $ 1,292,000,000.00 | $ 1,796,108,988.00 | $ 1,415,108,988.00 |
| National Gypsum**+ | 1990 | $ 446,300,000.00 | $ 551,360,988.00 | $ 1,292,000,000.00 | $ 1,843,360,988.00 | $ 1,397,060,988.00 |
| G-1 Holdings Inc. | 2001 | $ 654,585,000.00 | $ 504,108,988.00 | $ 1,292,000,000.00 | $ 1,796,108,988.00 | $ 1,141,523,988.00 |
| T.H. Agriculture | 2008 | $ 720,800,000.00 | $ 172,337,674.00 | $ 1,292,000,000.00 | $ 1,464,337,674.00 | $ 743,537,674.00 |
| Eagle-Picher **+ | 1991 | $ 730,300,000.00 | $ 551,360,988.00 | $ 1,292,000,000.00 | $ 1,843,360,988.00 | $ 1,113,060,988.00 |
| ASARCO | 2005 | $ 747,270,000.00 | $ 349,138,988.00 | $ 1,292,000,000.00 | $ 1,641,138,988.00 | $ 893,868,988.00 |
| Kaiser Aluminum & Chemical Corp. | 2002 | $ 852,670,000.00 | $ 479,424,988.00 | $ 1,292,000,000.00 | $ 1,771,424,988.00 | $ 918,754,988.00 |
| Owens Corning - Fiberboard | 2000 | $ 1,011,465,000.00 | $ 522,832,988.00 | $ 1,292,000,000.00 | $ 1,814,832,988.00 | $ 803,367,988.00 |
| Combustion Engineering | 2003 | $ 1,081,584,000.00 | $ 441,460,988.00 | $ 1,292,000,000.00 | $ 1,733,460,988.00 | $ 651,876,988.00 |
| Babcock & Wilcox | 2000 | $ 1,143,900,000.00 | $ 522,832,988.00 | $ 1,292,000,000.00 | $ 1,814,832,988.00 | $ 670,932,988.00 |
| Celotex**+ | 1990 | $ 1,245,600,000.00 | $ 551,360,988.00 | $ 1,292,000,000.00 | $ 1,843,360,988.00 | $ 597,760,988.00 |
| Armstrong World Industries | 2000 | $ 1,339,650,000.00 | $ 522,832,988.00 | $ 1,292,000,000.00 | $ 1,814,832,988.00 | $ 475,182,988.00 |
| Global Industrial (DII Industries) | 2002 | $ 1,508,160,000.00 | $ 479,424,988.00 | $ 1,292,000,000.00 | $ 1,771,424,988.00 | $ 263,264,988.00 |
| Western Asbestos | 2002 | $ 1,680,756,000.00 | $ 479,424,988.00 | $ 1,292,000,000.00 | $ 1,771,424,988.00 | $ 90,668,988.00 |
| Pittsburgh Corning | 2000 | $ 2,044,440,000.00 | $ 522,832,988.00 | $ 1,292,000,000.00 | $ 1,814,832,988.00 | $ (229,607,012.00) |
| Owens Corning - subfund | 2000 | $ 2,225,145,000.00 | $ 522,832,988.00 | $ 1,292,000,000.00 | $ 1,814,832,988.00 | $ (410,312,012.00) |
| Johns Manville Personal Injury**+ | 1982 | $ 2,500,000,000.00 | $ 551,360,988.00 | $ 1,292,000,000.00 | $ 1,843,360,988.00 | $ (656,639,012.00) |
| W.R. Grace | 2001 | $ 2,620,904,000.00 | $ 504,108,988.00 | $ 1,292,000,000.00 | $ 1,796,108,988.00 | $ (824,795,012.00) |
| United States Gypsum | 2001 | $ 3,363,195,000.00 | $ 504,108,988.00 | $ 1,292,000,000.00 | $ 1,796,108,988.00 | $ (1,567,086,012.00) |
| NARCO (Includes NARCO-Affiliated Debtors: I-Tec Holding Corp., InterTec Company, Honeywell and Tri-Star Refractories, Inc.) | 2002 | $ 3,792,000,000.00 | $ 479,424,988.00 | $ 1,292,000,000.00 | $ 1,771,424,988.00 | $ (2,020,575,012.00) |

*** Settlement payments only between 1984 and 2010 for Garlock. See Bates Report, Ex.8 and GST 1165.**

**** Rand report did not provide propotional breakout, assume 100 percent of trust funding is meso funding.**